United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74 - 2037

UNITED JEWISH ORGANIZATIONS OF
WILLIAMSBURGH, INC., et al.,

Plaintiffs-Appellants,

v.

MALCOLM WILSON, et al.,

Defendants-Appellees,

N.A.A.C.P., et al.,

Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF NEW YORK

BRIEF FOR INTERVENORS-APPELLEES, N.A.A.C.P., ETC., ET AL.

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BRIEF FOR INTERVENORS-- APPELLEES

Preliminary Statement

This is an appeal from an order and decision of District Judge Walter Bruchhausen of the Eastern District of New York dismissing plaintiffs' complaint for failure to state a claim upon which relief could be granted. That decision is not yet reported.

The Intervenors-Appellees, N.A.A.C.P. etc., et al., were

permitted to intervene in the District Court as party defendants by order dated July 25, 1974.

Questions Presented

1. Do plaintiffs-appellants have standing to challenge the validity of Chapters 588-591, New York Laws of 1974, insofar as those provisions altered the Senate and Assembly lines in Kings County.

2. Are Chapters 588-591, New York Laws of 1974, insofar as those provisions altered the Senate and Assembly lines in Kings County, violative of the Fourteenth Amendment.

Statute Involved

Section 5 of the Voting Rights Act of 1964, 42 U.S.C. §1973c, provides in pertinent part:

> Whenever . . . a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard,

practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such preceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Statement of the Case

In January of 1972, the State of New York enacted legislation altering the Senate and Assembly lines in Kings County in view of changes in population between the 1960 and 1970 census. Chapter 11, Laws of New York, 1972. On January 5, 1974, as a result of litigation maintained by the Intervenors N.A.A.C.P., etc., et al., the United States District Court for the District of Columbia placed Kings, Bronx, and New York Counties under the coverage of the federal Voting Rights Act. 42 U.S.C. §1973b. See New York v. United States, No. 2419-71 (D.D.C.). Because of this decision, New York was required by the Voting Rights Act to obtain federal approval of the 1972 district lines. See 42 U.S.C. §1973c. Appendix, V. I., Tab 1. New York duly sought such approval from the Attorney General

of the United States.

On April 1, 1974, Assistant Attorney General Stanley Pottinger disapproved the Senate and Assembly lines in Kings County on the ground that they discriminated on the basis of race. Mr. Pottinger's decision that the 1972 lines were discriminatory automatically rendered use of those lines illegal. The sole procedure permitted by the Voting Rights Act to review Mr. Pottinger's decision was an action by the United States District Court for the District of Columbia. The Attorney General of New York, Louis J. Lefkowitz, after consultation with the Governor and legislative leaders, declined to seek such appellate review.

In the wake of Mr. Pottinger's decision the N.A.A.C.P. sought appropriate relief from Judges Steward, Bauman, and Hays, in N.A.A.C.P. v. New York City Board of Elections, 72 Civ. 1460 (S.D.N.Y.), to compel the state to enact new district lines in compliance with Mr. Pottinger's order. The Court in the N.A.A.C.P. action, in comments from the bench, made it clear that they would forbid any attempt to use the discriminatory 1972 lines, and would invalidate any future election held on those lines. Under threat of a court order to do so in N.A.A.C.P. v. New York City Board of Elections, the state legislature on May 30, 1974, enacted new Senate and Assembly lines in an attempt to remove the discriminatory aspects of the 1972 lines and to comply with Mr. Pottinger's decision. Chapters 588-591, New York laws of 1974. Assistant Attorney General

Pottinger approved the new lines on [illegible] 1, 1974. Appendix, V. II, Tab 16.

This action is not about whether the number of majority non-white district in Kings County should or could be "maximized". The problem with which Assistant Attorney General Pottinger and the New York Legislature were concerned was that the original 1972 lines had the effect of minimizing the number of districts with a non-white majority, and thus minimizing the number of non-whites who could be or were elected to the Senate or Assembly. Chapters 588-591 were enacted specifically to eliminate this discriminatory effect of the old lines, and to assure non-white voters an equal opportunity to elect candidates of their choice. The provisions under attack did not create the largest possible number of districts with non-white majorities; they merely raised that number to a level in accord with the total non-white population of the county.

The substantive issues raised by this action are whether there was substantial evidence to support Mr. Pottinger's decision that the 1972 lines were discriminatory, and whether the Fourteenth Amendment forbids state action to remedy racial discrimination. The threshold jurisdictional question is whether the plaintiffs-appellants have standing to bring this action.

I. Appellants Lack Standing To Maintain This Action

(1) Private Plaintiffs Lack Standing To Obtain Judicial Review Directly Or Indirectly Of A Decision Of The Attorney General Under Section 5 Of The Voting Rights Act

The 1972 district lines were submitted by New York to the United States Attorney General for his approval under Section 5 of the Voting Rights Act. Section 5 provides in pertinent part that no new election law enacted after November 1, 1968, may be enforced in Kings County unless New York first obtains federal approval of that new law. Redistricting laws, such as Chapters 588-591, require such federal approval. Georgia v. United States, 411 U.S. 526 (1973). Federal approval may be obtained in either of two ways: (1) New York may submit the law to the Attorney General of the United States, and the law is deemed approved if the Attorney General does not object to the law within 60 days of the submission, (2) New York may seek a declaratory judgment from a three judge federal court in the District of Columbia. Whether approval is sought from the Attorney General or the United States District Court for the District of Columbia, the burden of proof is on New York to establish that the new law does not have the effect of discriminating on the basis of race.

It was contemplated by Congress, and has in fact been the practice, that states covered by the Voting Rights Act first seek approval of new laws from the Attorney General. If the Attorney General disapproves the new law, the state may seek

approval instead from the District Court for the District of Columbia. The latter proceeding operates as an appeal from the Attorney General's decision, and the proceeding is a de novo hearing. States whose laws have been rejected by the Attorney General rarely seek judicial review of that decision. In the 9 years the Voting Rights Act has been in effect, the District Court for the District of Columbia has never overturned a decision of the Attorney General disapproving a state law under Section 5. See e.g., Beer v. United States, No. 1495-73 (D.D.C.) (Opinion dated April 5, 1974); City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972), aff'd sub nom. Diamond v. United States, 412 U.S. 934 (1973).

When the United States Attorney General disapproves a proposed law, the Voting Rights Act confers upon New York public officials exclusive responsibility for deciding whether to seek judicial review of that decision. The pertinent portion of section 5 provides

> Whenever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the Unite States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color,

and until such judgment is obtained the new law may not be enforced. 42 U.S.C. §1973c (Emphasis added).

There are several reasons why section 5 gives to state officials exclusive responsibility for deciding whether to seek review of the Attorney General's decision. The dispute over whether the new law is discriminatory is fundamentally a dispute between the state, which wants to enforce the new law, and the Attorney General of the United States. It is only sensible that the state have control over such litigation, including over the decision whether to seek judicial review at all. The decision of a state whether to seek judicial review must reflect a variety of state interests, including weighing the likelihood of success against the problems of continued uncertainty as to the new law's validity. Above all, the unprecedented procedures under section 5 necessarily raise difficult problems of federal-state relations and Congress understandably concluded that such problems ought to be resolved directly, and exclusively, between the two sovereigns. See Allen v. Board of Elections, 393 U.S. 544, 562 (1968).

In the instant case, after Assistant Attorney General Pottinger disapproved the 1972 lines, the Attorney General of New York conferred with the Governor and legislative leaders. They decided, in view of the shortage of time until the next election, and the uncertain prospects of an appeal, not to seek judicial review of Mr. Pottinger's decision. See Interim Report of the Joint Committee on Reapportionment, pp. 2-3. The plaintiffs commenced this action because they disagree

with the manner in which Attorney General Lefkowitz decided to conduct litigation on behalf of New York, and disagree in particular with his decision not to appeal Mr. Pottinger's decision. But the conduct of litigation by and for the sovereign state of New York cannot be controlled by any private attorney or citizen who happens to be interested in that litigation. There is and can be only one Attorney General of the State of New York, and only one person can supervise the State's ligigation. Plaintiffs do not question Mr. Lefkowitz's good faith or competence, in handling this litigation or in declining to appeal further the Pottinger decision. Plaintiffs merely assert that, had any of them been Attorney General, they would have decided the matter differently. But such differences of opinion cannot justify stripping Attorney General Lefkowitz of his responsibilities as a state official, and turning his job, in part or whole, over to plaintiffs or their counsel. Plaintiffs, who are solely concerned with the effect of redistricting on their own community, have very different interests than Attorney General Lefkowitz, who must consider the interests of the state as a whole, including the disruptive effects of further appeals on the verge of a general election. It is Attorney General Lefkowitz, not private citizens, who must assess what course of conduct is in the best interests of the state of New York.

This question has arisen before in this very case. In late April of 1974, several Brooklyn politicians disagreeing with Attorney General Lefkowitz's decision to comply with the

Pottinger decision, attempted to bring their own lawsuit to overturn the Pottinger order. Griffiths v. United States, Civil Action No. 74-648 (D.D.C.). The District Court for the District of Columbia dismissed the complaint sua sponte

> The plaintiffs are apparently attempting to secure a review of the Attorney General's findings that certain plans submitted pursuant to the Voting Rights Act of 1965 by the State of New York have "the purpose or effect of abridging the right to vote because of race or color." (Letter of April 1, 1974, from Stanley Pottinger, Assistant Attorney General). Under the Voting Rights Act, 42 U.S.C. §1973c, a request for review of the Attorney General's findings may be made only by the "State or political subdivision" covered by the Act. The plaintiffs, as individual Assemblymen from Kings County, lack standing under the Act to bring this action.

Opinion dated May 3, 1974 (Green, J.). The United States Court of Appeals for the District of Columbia affirmed the dismissal.

This action, like Griffiths, seek to do what under the law only Attorney General Lefkowitz could seek - obtain judicial review of Mr. Pottinger's decision on behalf of a private litigant. The Complaint seeks a declaratory judgment that Mr. Pottinger's decision was erroneous. Complaint, p. 11. Plaintiffs do not deny that, if Mr. Pottinger's decision was correct, the 1974 district lines would be not only constitutional but necessary. Manifestly, if private parties cannot obtain judicial review of the Pottinger decision by a suit against the United States in the District of Columbia, they cannot obtain such review by a suit against the United States in the Eastern District of New York. And if such direct review is unavailable,

plaintiffs cannot obtain judicial review indirectly by seeking to enjoin New York from complying with the Pottinger ruling on the alleged ground that the Pottinger decision was erroneous.

The Supreme Court has repeatedly rebuffed attempts such as this to circumvent the jurisdictional limits of the Federal courts. In Edelman v. Jordan, 39 L. Ed. 2d 622 (1974), the plaintiffs wanted to sue the state of Ohio for retroactive welfare benefits, an action precluded by the Eleventh Amendment. To escape that limitation the plaintiffs cast their action as one against individual state officials for "equitable restitution". The Supreme Court disallowed this aspect of the action, holding that the relief sought against the officials was "in practical effect indistinguishable" from the sort of direct suit against the state forbidden by the Eleventh Amendment. 39 L.Ed. 2d at 676.

The instant action is even more inimical to the Voting Rights Act than Griffiths itself. One of the key changes in voting rights litigation sought by Congress in 1964 was to alter the judicial forum in which such cases were heard, and to confine all such cases to a three judge panel for the United States District Court for the District of Columbia. That change reflected a congressional concern that individual federal and state judges in the south had proved unwilling to protect the rights of non-white voters. Plaintiffs-appellants assert the right, not only to attack collaterally Mr. Pottinger's decision, but to do so in the state where Mr. Pottinger held the rights of non-whites

were being violated. If an action such as this, purporting to attack the constitutionality of Chapter 588-591, was maintainable in the Eastern District of New York, it could presumably have been commenced as easily in state courts. In the wake of the judicial inaction and hostility that preceded the enactment of the Voting Rights Act, it is inconceivable that Congress intended to permit a decision such as this by the United States Department of Justice to be reviewable by a state or federal judge in Mississippi or Alabama. No different rule may be applied here.

Such a rule does not preclude appellants from obtaining consideration of their legal arguments. When the original 1972 lines were under consideration by Assistant Attorney General Pottinger, appellants, like the N.A.A.C.P. and all other interested groups and individuals, had ample opportunity to argue their position to the Department of Justice. Later, when the 1974 lines attacked herein were under consideration by Mr. Pottinger, appellants again had such an opportunity and in fact urged the Assistant Attorney General to disapprove those new lines. If appellants believe Kings County should not be subject to the Voting Rights Act at all, they are free to file an amicus brief to that effect in New York v. United States, now pending on appeal before the United States Supreme Court. But maintain the instant action they cannot, for it is the wrong remedy before the wrong forum commenced by the wrong plaintffs. Since

Chapters 588-591 are undeniably constitutional if the 1972 lines which they replaced were discriminatory, and since the Assistant Attorney General's determination that the 1972 lines discriminated on the basis of race is not reviewable in this section, the complaint fails to state a claim on which relief could be granted.

(2) Plaintiffs Lack Standing Because There Is No Necessary Connection Between The Alleged Injury to Plaintiffs And The Alleged Constitutional Defect in the 1974 Lines

The purported interest which the plaintiffs-appellants seek to protect by this action is in having the entire Hassidic community included within the same Senate and Assembly district. The Complaint stresses that the members of the Hassidic Community are "closely knit", have close cultural and religious ties, and have for years been "recognized as a single community" and placed entirely in a single legislative district. Complaint, paragraphs 7, 8, 10. Being placed in a single district, plaintiffs allege, encourages participation in the democratic process and increases their political influence. Complaint, paragraph 9. It is not denied that the Hassidic community is located entirely within the same Congressional, City Council, and Community School Board district, but plaintiffs claim this is not sufficient. The 1974 district lines, Chapters 588-591, are said to harm plaintiffs' interest by dividing the Hassidic community between two Assembly districts and two Senate districts. Complaint, paragraphs 24-25. This division, it is claimed, diluted the value of the plaintiffs' votes. Complaint, paragraph 26.

Plaintiffs' witnesses reiterated that they were aggrieved solely because the Hassidic community had been divided, and disclaimed any objection to being in a district which happened to have a non-white majority.

Q. (Mr. Schnapper) I believe you testified in response to Mr. Lewin's question that you did not have any objection or did any of your organizations which you remember to being in a community which happened to have a non-white majority.

A. (Rabbi Friedman) I testified we are right now in a district which has a non-white majority and we do not object to those lines.

Q. What you do object to is being split, between districts?

A. Basically we object to being split, correct.

Q. . . . If you were in a district which was 75 or 70 percent non-white you would not object so long as you were in the same district all together?

A. If we were kept together without cutting us up we wouldn't play the percentage game.

Transcript, pp. 41-42

Q. (Mr. Schnapper) . . . I take it that what you object to - that the harm that you feel the Hassidic community has suffered by these new lines, it has occurred because the Hassidic community is split in half; is that correct?

A. (Rabbi Stauber) Right.

Q. It's not because part or all of the Hassidic Community may be in a district that has a non-white majority? You don't object to

being in a district of non-white majority?

A. No, we don't.

Transcript, pp. 104-105.

Q. (Mr. Schnapper) Mr. Lefkowitz, I take it that the harm that will occur in terms of your political aspirations is harm caused by these lines because the Williamsburgh Community has been split in half; is that correct?

A. (Mr. Lefkowitz) That is correct.

Q. If the community were all in one district, even though it might have a majority of Blacks, that would be okay with you?

A. No objection at all.

Transcript, p. 112.

Plaintiffs lack standing to maintain this action because, even if they succeed in invalidating the 1974 lines, that will not vindicate the interests which they here assert. Plaintiffs urge that, in enacting the 1972 lines, the legislature improperly considered the racial composition of districts. Complaint, paragraphs 12-25. No connection, however, is apparent between the use of such criterion and the division of the Hassidic community of which plaintiffs complain. The same criterion were used in redrawing the 1974 Congressional lines; these lines, however, place the entire Hassidic community in a single congressional district, and plaintiffs assert no grievance with them. It would clearly have been possible to create Senate and Assembly districts which located the Hassidic community in a single district and still satisfied the allegedly unlawful criterion.

Mr. Scolaro, the Executive Director of the Joint Legislative Committee on Reapportionment, testified that redistricting plans could have been framed which satisfied Mr. Pottinger's ruling, as well as the alleged 65% standard, and still kept the Hassidic community entirely within a single district. The Hassidic community is split by the 1974 lines between the 57th and 56th Assembly Districts.

Q. (Mr. Schnapper) Now, Mr. Scolaro, you testified with regard to the problem of the Hassidic community in the 57th Assembly district that you had concluded that it would not be possible to put all the Hassidic community in the 57th Assembly district without violating the Department of Justice orders; is that correct, sir?

A. That is correct.

Q. Now, did you consider putting the entire Hassidic community in the 56th Assembly district?

A. That was one variable that we came up with, yes, and that would require a moving of a portion of the Hassidic community which is presently in the 57th district totally into the 56th district, and that would have resulted, to the best of my knowledge, in two districts, both of whcih would be over 65 percent non-white, and the 56th district with the Hassidic community in total in that community would probably be close to 76, 77 percent non-white . . .

Q. But, Mr. Scolaro, in hindsight, it would have been possible under that scheme to both comply with the Justice Department 65 percent standard, if that was their standard,

and keep the Hassidic community together.

A. Yes . . .

Transcript, pp. 172-173. Mr. Scolaro testified similarly regarding the Senate lines.

Q. . . . Would it be, would it have been or would it be possible to redraw the Senate lines so that the entire Hassidic community was within a single Senatorial district and still comply with the 65 percent requirement?

A. You are dealing with such a large number in the Senatorial district, 304,000 people, that I am sure there would be a way; to the best of my recollection, there would be a way of drawing Senatorial lines if you redraw the other lines and you could probably affect compliance.

Transcript, p. 175.

Scolaro's testimony was confirmed by the alternative districting plans which were submitted to the District Court. Plaintiffs submitted a proposed alteration of the Senate lines which would place the entire Hassidic community in the 25th Senate district. Plaintiffs' plan did not, however, significantly alter the total ethnic composition of the two Senate districts involved. The total non-white population of the 23rd Senate district is actually increased by 139, and it would remain 71.1% non-white. See Affidavit of James Rocap, Appendix, V. II, Tab 10. Similarly, intervenors submitted a proposed alteration of the Assembly lines which would place the entire Hassidic community in the 56th Assembly district. Under this hypothetical plan both

the 56th and 57th Assembly districts would remain well over 70% non-white. See Affidavit of Eric Schnapper, Appendix, V.II, Tab 14. In sum, it would have been entirely possible to comply with Mr. Pottinger's ruling and still avoid dividing the Hassidic community between two or more districts.

Similarly, if the legislature were now directed to prepare new lines without considering the racial composition of the districts, there is no guarantee that under the new lines the Hassidic community would not be divided among two, three or more Senate or Assembly districts. See Transcript, p. 175. On the contrary, it is entirely possible that under a new set of district lines the alleged division of plaintiffs' community would be as bad or worse. Plaintiffs do not, of course, claim that in creating legislative districts the state is constitutionally required to discriminate in favor of Hassidic Jews, at the expense of Catholics, Italians, or non-believers, or in favor of whites at the expense of Blacks and Puerto Ricans.

The Supreme Court has long required that, to establish standing, there must be directed and necessary connection between the illegality challenged and the right allegedly impaired. As the Court reiterated in Flast v. Cohen, 392 U.S. 83, (1968). a plaintiff must show

> a logical nexus between the status asserted and the claim sought to be adjudicated. . . . Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a

> proper and appropriate party to invoke federal judicial power.

392 U.S. at 102.

This principle was recently reiterated by the Supreme Court in Linda R.S. v. Richard D., 410 U.S. 614 (1973). In that case the plaintiff was an unwed mother aggrieved because the father of her child had failed to pay any child support. State law made it a crime for the father of a legitimate child to refuse support, but did not make criminal the same refusal by the father of an illegitimate child. The mother sued to compel prosecution of the father of her child, claiming that the distinction between legitimate and illegitimate children was unconstitutional. The District Court dismissed the action for lack of standing and the Supreme Court affirmed

> [A]ppellant has made no showing that her failure to secure support payments results from the non-enforcement as to her child, of [the state criminal law] . . . [I]f appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best be termed only speculative. Certainly the "direct" relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case.

410 U.S. at 618.

The instant case is indistinguishable from Linda R.S. Although Mr. Pottinger's order prompted the legislature to enact the 1974 lines, there is no

showing that compliance with that order or the allegedly unconstitutional criterion required a division of the Hassidic community. On the contrary, the legislature could easily have complied with that order and used that criterionwithout dividing the Hassidic area among several districts. Similarly, even if plaintiffs' legal claims were upheld, that would not prevent equal or greater fragmentation of the Hassidic community.

Since there is not the necessary connection between the alleged illegality of the 1974 lines and the injury which those lines have allegedly inflicted on plaintiffs, plaintiffs lack standing to challenge the constitutionality or lawfulness of the 1974 lines.

II. Chapters 588-591, In So Far As They Alter Senate and Assembly Districts in Kings County, Are Constitutional

Plaintiffs' Complaint relies primarily on the fact, which is not disputed, that in drawing the Senate and Assembly lines contained in Chapters 588-591, the legislature took into consideration the racial composition of the districts. Plaintiffs urge that, in general, it is impermissible to take into account such racial considerations. In the instant case, however, the previous district lines, enacted in 1972, had been held by the Attorney General of the United States, under the Voting Rights Act, to discriminate on the basis of race. The responsibility of the legislature which enacted Chapters 588-591 was to adopt changes which eliminate the discriminatory effect of the 1972 lines. Under such circumstances it was necessary as a practical matter, and mandatory as a matter of law, that the legislature consider as it did the racial composition of the new districts.

Chapters 588-591 were enacted as a result of the decision of Assistant Attorney General Pottinger on April 1, 1974, disapproving the Senate and Assembly lines in Kings County originally enacted in 1972. Mr. Pottinger's decision was set forth in a brief letter, which is annexed to the Complaint as Exhibit VI, Appendix V.I, Tab 1. Under the Voting Rights

Act Mr. Pottinger was required to disapprove the 1972 lines if either their purpose or their effect was to discriminate on the basis of race, the burden of proof being on the State of New York. Mr. Pottinger concluded that the 1972 lines had such a discriminatory effect, and did not reach the question of whether they were enacted with a discriminatory purpose.

Mr. Pottinger's decision was based on an extensive record demonstrating both the discriminatory purpose and the discriminatory effect of the 1972 lines. The most important portions of that evidence was contained in a Memorandum in Opposition to Approval of Chapters 11, 76, 77 and 78 New York Laws of 1972 (hereinafter cited as "Memorandum") and a letter dated March 21, 1974 (hereinafter cited as "Letter") both submitted by counsel for the N.A.A.C.P., etc., et al., intervenors in the instant action. See Appendix V.I., Tab. 8. Copies of the Memorandum and Letter have been filed with the Court.

These documents indicated that the 1972 lines, as previous redistricting, had been deliberately gerrymandered to keep in office, despite a growing non-white population in Kings County, white members of the Assembly and Senate. This gerrymandering was accomplished by pairing non-white neighborhoods with far larger white areas, so that most non-white voters were placed in districts with substantial white majorities. Memorandum 5-10. Voting patterns clearly indicated that white voters voted as a block against a Black or Puerto

Rican candidate (Memorandum, pp. 15-20) and no Black or Puerto Rican had ever been elected to the legislature from Kings County by a district with a majority of white voters. As a result of this gerrymandering, although 35.6% of the population of Kings County was non-white, only 11.7% of the Senate districts and 23.2% of the Assembly districts had non-white majorities. Letter, p. 2. There were 574,811 non-whites living in predominantly white Senate districts, but only 44,081 whites living in predominantly non-white Senate districts. Similarly, there were 361,707 non-whites living in predominantly white Assembly districts, but only 135,260 whites living in predominantly non-white Assembly districts. Memorandum, p. 22. As a result, a majority of Blacks and Puerto Ricans in Kings County were gerrymandered into districts where a Black or Puerto Rican candidate could not possibly be elected, and were thus effectively deprived of the right to vote. The legislative history of the 1972 was rife with potential for, and actual instances of, racial discrimination. Memorandum, pp. 11-14. Statistical analysis indicated that the few non-white districts, placed at the very center of the ghetto, were quite compact, but the white districts used to disenfranchise non-white voters were far from compact since they were drawn to pair ghetto communities with larger white areas miles away. Memorandum, pp. 27-29. Statistics indicated that, had the number of non-white districts been proportionate

to the proportion of the Kings County population which was non-white, there would have been 2 more predominantly non-white Senate districts and 3 more predominantly non-white Assembly districts. Letter, p.3.

The evidence which prompted Assistant Attorney General Pottinger to disapprove the 1972 Senate and Assembly lines in Kings County was substantially stronger than that which had led to his decision several months earlier to disapprove the New Orleans City Council lines. The latter decision was upheld unanimously by a three judge federal court in Beer v. United States. (D.D.C. 1974.)

In view of Mr. Pottinger's decision, the legislature properly undertook to fashion a new districting plan which would not involve the discriminatory effect of the 1972 lines. To determine whether its proposed plan would have a discriminatory effect, the legislature manifestly had to consider the same factors relied upon by Mr. Pottinger and the district court in Beer in overturning previous plans. This required, as a practical matter, that the legislature reduce the number of non-whites disenfranchised by dispersal into predominantly white districts, and bring the number of non-white Senate and Assembly districts into line with the proportion of Kings County which was non-white.

The use of such racial considerations to undo the effect of previous discrimination has been sanctioned by the federal courts in a wide variety of circumstances.

In remedying the effect of school segregation, consideration of the racial composition of schools has long been sanctioned. In Wanner v. County School Board of Arlington County, 357 F.2d 452 (4th Cir. 1966), the school board voluntarily adopted a pupil assignment plan based on the race of the students. White parents sued to enjoin the plan as discriminatory, but the Fourth Circuit upheld it.

> It would be stultifying to hold that a board may not move to undo arrangements artificially contrived to effect or maintain segregation on the ground that this interference with the status quo would involve "considerations of race." When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions -- especially conditions that have been judicially condemned -- their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the "consideration of race" which the Constitution discountenances.

357 F.2d at 454. In Swann v. Charlotte-Mecklenburg Board of Education, the Supreme Court expressly upheld the use of a racially based pupil assignment plan to end the effects of discrimination, on the ground that "[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations." 402 U.S. 1, 18 (1971). In a companion case the Court held unconstitutional a North Carolina law which prohibited the assignment of students "on account of race," reasoning that such a statute would obstruct the creation of effective remedies.

North Carolina Board of Education v. Swann, 402 U.S. 43, 45 (1971).

> Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy.

402 U.S. at 46.

The Second Circuit has affirmatively sanctioned the use of racial criterion to promote integrated housing. In Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968), the plaintiffs claimed that Norwalk's relocation practices had had the effect of driving Black and Puerto Rican residents out of the city, and sought affirmative action involving more housing for non-whites in the city. The Second Circuit held that such relief was permissible.

> What we have said may require classification by race. That is something which the Constitution usually forbids, not only because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.

395 F.2d 920, 931-32. On the same theory, the Second Circuit has sanctioned the exclusion of non-whites from a heavily non-white housing project to prevent it from reaching a "tipping point" and accelerating the departee of whites. Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973). Affirmative action to overcome past policies of discrimination in public housing,

including a deliberate preference for previous excluded non-whites, has been widely upheld. See Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971), Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970) cert. denied 401 U.S. 1010); Heyward v. Public Housing Administration, 238 F.2d 689 (5th Cir. 1956).

The use of racial considerations, particularly deliberately instituted quotas requiring preferential hiring of non-whites, is one of the most common common tools used to remedy racial discrimination in employment. As the First Circuit pointed out in Associated General Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), such quotas have been sanctioned in literally dozens of reported cases.

> [O]ur society cannot be completely color blind in the short term if we are to have a color blind society in the long term. After centuries of viewing through colored glasses eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself . . .. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities."

490 F.2d 9, 16, cert. denied 42 U.S.L.W. 3594 (1974). The use of racial considerations to overcome the effect of previous discrimination has been sanctioned in a variety of other areas. See e.g. Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966) (grand juries). Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970) (school administrators.)

Plaintiffs-Appellants assert that the 1972 lines should not have been disapproved by Assistant Attorney General Pottinger unless those lines were enacted with the purpose of discriminating on the basis of race. But the Voting Rights Act requires the Attorney General to disapprove redistricting laws which have the "purpose or effect" of discriminating on the basis of race. 42 U.S.C. § 1973c. The "effect" clause of the Voting Rights Act has been expressly upheld by the Supreme Court as applied to redistricting laws. In 1972 the Attorney General disapproved the Georgia congressional district lines because they had a "discriminatory racial effect on voting." Georgia v. United States, 411 U.S. 526, 530 (1973). The Supreme Court enjoined use of Georgia's 1972 district lines, noting that any redistricting had "the potential for diluting the value of the Negro vote." 411 U.S. at 535. In 1973 the Attorney General disapproved certain redistricting of the New Orleans City Council lines on the grounds that the lines had a discriminatory effect. A three judge federal court in the District of Columbia unanimously upheld the Attorney General's decision without deciding the purpose of the redistricting. After reviewing the evidence regarding the purpose of the New Orleans City Council lines ("Plan II"), the Court held

> Such, in brief, is the posture of the evidence directed toward the issue of purpose of Plan II, an issue, however, which we have no occasion to decide. New Orleans, we reiterate, bears the burden of proving that the plan is untainted by racial discrimination, not only in its objective but also in its potential effect. For reasons

> we elaborate in the remainder of this opinion, we find that Plan II will have the effect of abridging the right to vote on account of race or color. So concluding, we need not ponder whether the framers of the plan intended that result to follow.

Beer v. United States, No. 1495-73 (D.D.C.) (Opinion dated April 5, 1974), pp. 41a-42a. (Emphasis added

In the area of employment discrimination, the Supreme Court has held that an employer's standards for hiring and promotion are unlawful if they have the effect of discriminating on the basis of race, regardless of the motives underlying those practices.

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate to discriminate on the basis of race . . . . The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees" . . . . But Congress directed the thrust of the [1964 Civil Rights] Act to the consequences of employment practices, not simply the motivation."

Griggs v. Duke Power Co., 401 U.S. 424, 431-432 (1971). See also Rowe v. General Motors Corporation, 457 F.2d 348, 355 (5th Cir. 1972); Penn v. Stumpf, 308 F.Supp. 1238, 1244 (N.D.Cal. 1970). In White v. Regester the Supreme Court unanimously invalidated a Texas redistricting plan on the ground that, regardless of its purpose, it had the effect of limiting the ability of non-whites to participate in the political processes and to elect legislators of their choice. 37 L.Ed. 2d 314, 324 (1973).

The lower federal courts have awarded relief from laws with a discriminatory effect, regardless of their purposes,

in a variety of areas. In an action challenging as discriminatory certain jury selection procedures, the Ninth Circuit held that the practices must be overturned if they had a discriminatory effect, regardless of their purpose. Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971).

> The object of the constitutional mandate is to produce master jury panels from which identifiable community classes have not been systematically excluded. The object is neither to reward jury commissioners with good motives nor to punish those with bad intentions. When a jury selection system actually results in master jury panels from which identifiable classes are grossly excluded, the subjective intent of those who develop and enforce the system is immaterial.

457 F.2d at 587. In upholding an action challenging the discriminatory effect of certain city relocation practices, the Second Circuit held that

> The fact that the discrimination is not inherent in the administration program, but is, in the words of the District Court, "accidental to the plan," surely does not excuse the planners from making sure that there is available relocation housing for all displacees. "Equal protection of the laws" means more than merely the absence of governmental action designed to discriminate. . . .

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968). In overturning certain school board practices in the District of Columbia, the District Court held:

> Orthodox equal protection doctrine can be encapsulated in a single rule: government action which without justification imposes unequal burdens or awards unequal benefits is constitutional. The complaint that analytically no violation

> of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false.

Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967). In Williams v. The Matthews Company, the Eighth Circuit ruled unlawful under the federal Fair Housing Act a landowner's practice of only selling land to qualified contractors.

> The courts will look beyond the form of a transaction to its substance and proscribe practices which actually or predictively result in racial discrimination, irrespective of defendant's motivation. See United States v. Grooms, 348 F.Supp. 1130, 1133-1134 (M.D. Fla. 1972); United States v. Real Estate Development Corporation, 347 F.Supp. 776, 782 (N.D. Miss. 1972); United States v. Reddock, No. 6541-71-P (S.D. Ala. filed Jan. 1, 1972), aff'd. 467 F.2d 897 (5th Cir. 1972).

Opinion dated June 20, 1974, slip opinion, pp. 11-12.

In order to assess whether the 1972 and proposed 1974 district lines would have a discriminatory effect, both the Attorney General and the legislature were required to determine whether a majority of the eligible voters in each district were white or non-white. The available census data, however, does not count the number of eligible voters on each block or census tract, but only the total population. The proportion of the eligible voters in a district who are non-white is substantially lower than the proportion of the total population which is non-white. First, a far higher proportion of white residents than non-white residents are old enough to vote. In Kings County, 75.3% of all whites are 18 or over, but only 51.1% of all Puerto Ricans and only 58.2% of all Blacks. See Appendix, V.I., Tab. 14, Table 1. Second, for technical reasons involving the

method by which the Census was conducted there is considerable uncertainty as to what proportion of the total population in each district is white and non-white. See Appendix, V.I., Tab 14, Table 3. Two alternative formulas have been used in computing these proportions. In the old 57th Assembly District for example, the non-white population was 60,774 (50.3%) under the "January" formula, and 73,910 (61.2%) under the "February" formula. Third, under New York law adults who move into Kings County from outside New York City must wait up to 23 months before becoming eligible to vote in a primary. See Rosario v. Rockefeller, 410 U.S. 752 (1973). In the relevant portions of Kings County the Democratic nomination is tantamount to election. Census data indicates that the proportion of non-whites disenfranchised by this law is 50-100% higher than the proportion of whites. See Appendix, V.I., Tab 14, Table 2.

Under these circumstances it was impossible for the Attorney General or the legislature to calculate with certainty the number of non-whites eligible to vote in a district. Clearly, in a district with a total non-white population of 51% under the February formula, whites would still constitute a very substantial majority of those persons eligible to vote. Non-whites would not be a majority of the eligible voters in a district unless they were far more than a majority of the total population, especially if the total population was calculated by the February formula. If, under these complex circumstances, the Attorney General

or legislature assumed that non-whites would not be a majority of the eligible voters in a district unless they were at least 65% of the February formula total population, that assumption was entirely reasonable.

It must be emphasized that the issue underlying Mr. Pottinger's decision was not maximizing the number of non-white seats or establishing any quota. The issue is equality of opportunity. Under the 1972 lines in Kings County, 56% of all non-whites were in majority white Senate Districts, but only 5% of all whites were in a majority non-white Senate District. Similarly, 36% of all non-whites were in majority white Assembly Districts, compared to only 11% of all whites in majority non-white Districts. Memorandum, p. 21. In a county where no Black or Puerto Rican had ever been elected to the legislature from a majority white district, these 1972 lines clearly disenfranchised a disproportionate number of non-white voters. The Fourteenth Amendment not only permitted but required New York to remedy that discrimination.

For these reasons the method by which the 1974 districts were drawn, and the statistical methods by which their ethnic compositions were calculated, were clearly constitutional.

Conclusion

For two and one half years the NAACP has been litigating to compel the enactment of racially fair district lines in Kings County to replace the gerrymandered 1972 lines. Within the last six months 23 federal judges have heard some aspect of this complex litigation. Since March this matter has been before 6 District Court judges, 8 Court of Appeals judges, and the entire United States Supreme Court. Everyone of these judges has sustained the position of the NAACP and refused to permit further delay of the long overdue redistricting which was finally adopted by the legislature on May 30, 1974. This Court should not consider overturning or postponing at the eleventh hour the 1974 district lines which resulted from these years of litigation.

For the foregoing reasons the decision of the District Court dismissing the complaint should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Eric Schnapper, hereby certify that on August 14, 1974, I served a copy of the brief for appellees, N.A.A.C.P., etc.,et al., upon counsel for the parties in this case by causing a copy thereof to be deposited in the United States mail, first class postage prepaid, addressed to:

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